Yong Kon Fatt v Indah Water Konsortium Sdn Bhd

HIGH COURT (IPOH) — CIVIL APPEAL NO 11–56 OF 2003
VT SINGHAM J
30 MARCH 2004

Civil Procedure — Striking out — Application for — Whether necessary to adduce evidence by affidavit in reply to oppose striking out application — Whether failure to rebut or contradict assertion constituted an admission

The plaintiff claimed for a sum being sewerage services rendered to the defendant for which the defendant had failed to settle the sum. The defendant had by the statement of defence denied the plaintiff's claim and applied to strike out the plaintiff's claim against him on the ground that the claim was frivolous and it was otherwise an abuse of the process of the court. The issues to be determined by the court were, inter alia: (1) whether the plaintiff was required to adduce evidence by affidavit to make out a reasonable prima facie cause of action or triable issue of fact when faced with a striking out application by the defendant; (2) whether the failure of the plaintiff to rebut or contradict the defendant's assertion that no sewerage services was provided to him constituted an admission of the said fact by the plaintiff. The magistrate ordered a full trial of the case in the face of the unchallenged affidavit by the plaintiff even though there was evidence of the defendant that no sewerage services were provided to him by the plaintiff. The defendant appealed.

Held, allowing the appeal with costs and striking out the plaintiff's claim:

(1) The plaintiff had failed to show that its claim was sustainable. The plaintiff had taken a belligerent stand and failed to respond to the defendant's application to strike out the plaintiff's claim by producing some materials before the court to show that there was a prima facie case to proceed for trial against the defendant. Where a claim was challenged and denied as in the instant case, the plaintiff was obliged to provide the details in order to sustain the claim for determination at a full trial and this ought to have been done by an affidavit in reply (see paras 9 and 11).

(2) As the plaintiff had failed to file and serve an affidavit in reply to challenge or contradict the defendant's assertion that no sewerage services were provided to the defendant's premises, the plaintiff was deemed to have admitted the defendant's averment that no services were in fact provided to his premises and therefore he was not liable to the plaintiff's claim (see para 7).

(3) On the facts and circumstances of the instant case and in the absence of an affidavit in reply by the plaintiff to the contrary, it was an appropriate case for the learned magistrate to strike out the plaintiff's claim. There was no necessity for a full trial since the plaintiff did not wish even to disclose at least a prima facie case for trial by attaching copies of the bills (see para 8).

[Bahasa Malaysia summary

Plaintif menuntut jumlah tuntutan bagi perkhidmatan pembentungan yang diberikan kepada defendan yang mana defendan telah gagal untuk membayarnya. Defendan melalui penyata pembelaan telah menafikan tuntutan plaintif. Dalam kes ini, defendan telah memfailkan dan menyerahkan satu permohonan untuk membatalkan tututan plaintif terhadapnya atas alasan bahawa tututan tersebut adalah remeh dan sebaliknya merupakan satu penyalahgunaan proses mahkamah. Isu-isu yang perlu diputuskan oleh mahkamah adalah, inter alia, (1) sama ada plaintif perlu melampirkan keterangan melalui afidavit untuk membina satu kausa tindakan prima facie yang munasabah atau pun isu fakta yang perlu dibicarakan apabila berdepan dengan permohonan pembatalan daripada defendan; (2) sama ada kegagalan plaintif untuk mematahkan atau menyangkal penyataan defendan bahawa tiada khidmat pembentungan diberikan kepadanya merupakan satu akuan fakta tersebut oleh plaintif. Majistret mengarahkan untuk mengadakan bicara penuh kes tersebut atas afidavit yang tidak disangkal oleh plaintif walaupun terdapat keterangan bahawa tiada perkhidmatan pembentungan diberikan kepadanya oleh plaintif.

Diputuskan, membenarkan rayuan dengan kos dan membatalkan tuntutan plaintif:

(1) Plaintif telah gagal untuk menunjukkan bahawa tuntutan plaintif boleh dibenarkan. Plaintif telah mengambil satu pendirian yang tegas dan gagal untuk memberi balasan kepada permohonan defendan untuk membatalkan tuntutan plaintif dengan mengemukakan apa-apa keterangan di hadapan mahkamah untuk menunjukkan bahawa terdapat kes prima facie untuk meneruskan bicara terhadap defendan. Sekiranya sesuatu tuntutan dicabar dan dinafikan seperti dalam kes sekarang ini, plaintif diwajibkan untuk mengemukakan butir-butir untuk membenarkan tuntutan untuk diputuskan pada perbicaraan penuh dan ini perlu dibuat melalui afidavit jawapan (lihat perenggan 9 dan 11).

(2) Oleh kerana plaintif telah gagal untuk memfailkan dan menyerahkan afidavit jawapan untuk mencabar atau menyangkal penyataan defendan bahawa tiada perkhidmatan pembentungan diberikan kepada premis defendan, plaintif telah disifatkan sebagai telah mengakui penegasan defendan bahawa memang tiada perkhidmatan pembentungan diberikan kepada premisenya dan oleh itu beliau tidak bertanggungjawab ke atas tuntutan plaintif (lihat perenggan 7).

(3) Berdasarkan fakta dan keadaan kes sekarang ini dan ketiadaan afidavit jawapan oleh plaintif yang menyatakan sebaliknya, adalah sesuai bagi majistret yang arif untuk membatalkan tuntutan plaintif. Tiada keperluan untuk bicara penuh memandangkan plaintif tidak mahu mendedahkan sekurang-kurangnya kes prima facie dengan mengepilkan salinan bil-bil tersebut (lihat perenggan 8).]

Notes

For cases on pleadings for striking out, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1580–1646.

Cases referred to

Alloy Automation Sdn Bhd v Perusahaan Iron Field [1986] 1 MLJ 382 (refd)

Kwong Yik Bank Bhd v Ansonia Management Associate Sdn Bhd [1999] 1 MLJ 366 (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)
Overseas Investment v Anthony William [1988] 3 MLJ 332 (refd)
Sunrise Sdn Bhd v First Profile (M) Sdn Bhd [1996] 3 MLJ 53 (refd)

Legislation referred to

Court of Judicature Act 1964 s 28(1)
Sewerage Services Act 1993 s 2, 30
Sewerage Services (Charges) Regulation 1994 reg 2, 7
Sewerage Services Authorisation to Demand Collect, and Retain Sewerage (Charges) Order 1995
Subordinate Courts Rules 1980 O 49 r 6(3)

Ng Hock Cheh (Ng Kor Ming with him) (Ng Hock Cheh & Co) for the appellant.
Rahimi Ramli (Azlan Shah Shaikh & Rashidi) for the respondent.

VT Singham J:

KEPUTUSAN

[1] Setelah membaca dan meneliti rekod rayuan, rekod rayuan tambahan, hujah-hujah bertulis bersama-sama dengan otoriti-otoriti dan seterusnya mendengar hujah-hujah secara lisan oleh kedua-dua pihak keputusan Mahkamah adalah seperti berikut:

Pertama:

Mahkamah ini benarkan prosiding rayuan ini diteruskan walaupun tuntutan responden/plaintif adalah kurang daripada RM 10,000 dan dihalang di bawah s 28(1) Akta Mahkamah Kehakiman 1964. Mahkamah ini benarkan rayuan diteruskan di atas alasan bahawa perayu telah membangkit soalan undang-undang berkaitan dengan Sewerage Services Act 1993 dibaca bersama dengan Sewerage Services (Charges) Regulation 1994.

[2] As to the appeal, the appellant has raised six questions of law in this appeal:

(1) Whether the plaintiff is in law required to adduce evidence by affidavit to make out a reasonable prima facie cause of action or triable issue of fact when faced with a striking out application by the defendant?

(2) Whether the magistrate should have held following *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 that the failure of the plaintiff to rebut or contradict the defendant's assertion that no sewerage services was provided to him constituted an admission of the said fact by the plaintiff.

(3) Whether in a striking out application by the defendant, the magistrate can order a full trial of the case in the face of the unchallenged affidavit by the plaintiff on the evidence of the defendant that no sewerage services were provided to him by the plaintiff?

(4) Whether a claim under the Sewerage Services Act 1993 read with Sewerage

Services (Charges) Regulations 1994 without stating any particulars on the mode/basis of calculation of the sewerage services is valid or proper in law?

(5) Whether in the absence of any affidavit in reply by the plaintiff or affidavit evidence to rebut the defendant's assertion that no sewerage services was provided by the plaintiff, the defendant is entitled to succeed in striking out the plaintiff's claim?

(6) Whether the magistrate having reserved his decision is required to give reasons or grounds for dismissing the defendant's striking out application?

[3] Section 2 under Interpretation of the Sewerage Services Act 1993 'sewerage services' means the collection conveyance treatment and 'disposal of' sewerage, and includes the operation and maintenance of a sewerage system and the clearing, cleaning and emptying of septic tanks.

[4] Regulation 2 under Interpretation of the Sewerage Services (charges) Regulations 1994 states: 'connected services, septic tank services' means the clearing, cleaning, emptying, removing and transporting of the sewerage sludge from septic tanks and includes the operation and maintenance of a sewerage system for the proper treatment and disposal of the sewerage sludge collected therefrom.

[5] The plaintiff's claim is for the sum of RM1,074 being sewerage services rendered to the defendant for which it is alleged bills have been sent to the defendant for payment but the defendant has failed, refused and neglected to settle the total sum of RM1,074 which has been calculated as at 30 September 2002. The defendant has by the statement of defence denied the plaintiff's claim.

[6] Jawapan kepada soalan (1):

(i) In this case, the defendant has filed and served an application to strike out the plaintiff's claim against him on the ground that the claim is frivolous and it is otherwise an abuse of the process of the court and this is conceded by the plaintiff's counsel. The respondent/plaintiff is required in law to adduce evidence by an affidavit in reply to oppose the defendant's application to strike out the statement of claim and to oppose that their claim against the defendants ought not to be struck out or dismissed by summary application.

(ii) Consequently, failure on the part of the respondent/plaintiff to file and serve an affidavit in reply to the appellant's/defendant's notice of application and affidavit affirmed on 17 June 2003 in support of the application to strike out the plaintiff's claim against him on the ground as being frivolous and it is otherwise an abuse of the process of the court is fatal as the plaintiff is deemed to have admitted the defendant's assertion that the appellant/plaintiff has not provided the sewerage services to the defendant's premises (see *Overseas Investment v Anthony William* [1988] 3 MLJ 332; Alloy Automation Sdn Bhd v Perusahaan Iron Field [1986] 1 MLJ 382; *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281; *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd* [1996] 3 MLJ 53).

(iii) The least the respondent/plaintiff could have done was to include and attach copies of the bills if it were in fact sent to the appellant/defendant for the

sewerage services rendered to the appellant's/defendant's premises by an affidavit in reply in order to show that there is an issue for trial but this was not done.

(iv) However, it is admirable to note where the respondent's/plaintiff's counsel was candid when she admitted that the plaintiff ought to have filed an affidavit's reply to contest the defendant's application to strike out its claim on the ground that it is frivolous and it is otherwise an abuse of the process of the court but the plaintiff had failed to do so and she was unable to advance any reason why it was not done as she was not the counsel in charge of the case at the lower court.

[7] Jawapan kepada soalan (2):

(i) As the plaintiff had failed to file and serve an affidavit in reply to challenge or contradict the appellant's/defendant's assertion that no sewerage services were provided to the defendant's premises, the plaintiff is deemed to have admitted the defendant's averment that no services were in fact provided to his premises and therefore he is not liable to the plaintiffs claim.

(ii) Where there is an unchallenged and unrebutted affidavit evidence to the defendant's claim that plaintiff had not provided sewerage services then it would constitute an admission by the plaintiff of that fact, ie the plaintiff has not provided sewerage services to the defendant's premises as claimed.

(iii) The plaintiff's statement of claim does not contain any particulars as to the period when the services were provided and the basis of the amount calculated to warrant the levy of RM1074 so as to give sufficient notice of the claim and consequently that itself obviously calls for a rebuttal evidence by an affidavit in reply by the plaintiff to the defendant's application to strike out the plaintiff's claim so that the plaintiff's claim may have a basis that it should be determined at a full trial.

[8] Jawapan kepada soalan (3) dan (5):

(i) On the facts and circumstances of the instant case and in the absence of an affidavit in reply by the plaintiff to the contrary, it is an appropriate case for the learned magistrate to strike out the plaintiff's claim.

[9] Jawapan kepada soalan (4)

(i) Regulation 7 of the Sewerage Services (Charges) Regulation 1994 would envisage that the plaintiff is obliged to state the particulars and basis of calculation of the sewerage services provided to the defendant which the plaintiff had failed to include in the statement to claim. Whilst the omission or failure to include the details itself does not necessarily make the claim unsustainable in law but however where the claim is challenged and denied as in the instant case, the plaintiff is obliged to provide the details in order to sustain the claim for determination at a full trial and this ought to have been done by an affidavit in reply.

[10] Jawapan kepada soalan (6)

(i) A magistrate who has reserved his decision in an interlocutory application is not required under the Subordinate Courts Rules 1980 to provide grounds for

this decision. In fact, the Rules Committee has by O 49 r 6 of the Subordinate Courts Rules 1980 deemed fit to dispense with the grounds of the judgment to interlocutory applications with the sole object of a speedier disposal of appeals arising out of a decision given in an interlocutory application. In fact the proviso to O 49 r 6(3) of the Subordinate Courts Rules 1980 states, inter alia, that the record of appeal 'should not include grounds of judgement' (see *Kwong Yik Bank Bhd v Ansonia Management Associate Sdn Bhd* [1999] 1 MLJ 366). However, and notwithstanding the said rules it would be good practice to provide brief reasons be it in a summary form when giving its oral decision.

[11] Having examined the pleadings and on considering the submissions of both parties it is the respectable view of this court that the plaintiff has failed to show that the plaintiff's claim is sustainable. The plaintiff seems to have taken a belligerent stand and had failed to respond to the defendant's application to strike out the plaintiff's claim by producing some materials before the court to show that there is a prima facie case to proceed for trial against the defendant. Justice of the case based on the facts and circumstances in the instant case requires that the plaintiff's claim ought to be struck out.

[12] The stand taken by the defendant to strike out the plaintiff's claim may tantamount to taking an extreme position against the plaintiff. However, since the plaintiff chose not to avail himself of the opportunity and did not file an affidavit in reply by at least attaching copies of the bills which is alleged to have been sent to the defendant ie if the alleged services were in fact provided as the defendant has denied the same, the plaintiff has to be prepared and accept the consequences arising out of that failure. If the plaintiff has provided the sewerage services and have supplied the bill or bills to the defendant why was it not produced by an affidavit to oppose the defendant's application to strike out the plaintiff's claim and there is no explanation for the blatant omission and consequently, the plaintiff should also be prepared to accept the legal consequences of having his claim struck out.

[13] Section 30 of the Sewerage Services Act 1993 authorises the Minister to prescribe sewerage charges, fees or levy to be paid by any user 'to whom sewerage services are provided' under the Act — sub-s (2) empowers the Minister to authorize a sewerage services contractor 'to demand, collect and retain the sewerage charges for or levy prescribed under sub-s (1) in respect of sewerage services provided by the sewerage services contractor ...'.

[14] It is not denied that the plaintiff is the authorised licensed sewerage services contractor and have been authorised by the Minister to demand, collect and retain the sewerage charges under the Sewerage Services Authorisation to Demand Collect, and Retain Sewerage (Charges) Order 1995.

[15] The threshold of the defendant's contention is that the plaintiff must produce evidence that the sewerages services have in fact been provided to the defendant's premises — which is lacking in precision. This court wishes to make it expressly clear that the decision of this court is only confined to the facts and circumstances in the instant case and is not a general application to other cases which may have been filed by the plaintiff and pending in other courts as this court did not have the benefit of the facts in other cases and also this is not a representative action and the decision is based on its own set of facts in the instant case.

[16] Further, there has been no application filed by the plaintiff seeking for extension of time to file an affidavit in reply if the plaintiff was desirous of filing an affidavit in reply. In fact, the plaintiff's counsel when requested by this court as to why an affidavit in reply was not filed, learned counsel replied that she was unable to explain why it was not filed as she was not the counsel in the lower court.

[17] On the facts and circumstances in the instant case, this court is satisfied that the plaintiff's claim is obviously unsustainable as being frivolous and it is otherwise an abuse of the process of the court and there is no necessity for a full trial since the plaintiff does not wish even to disclose at least a prima facie case for trial by attaching copies of the bills.

[18] Under the circumstances and accordingly the appeal is allowed with costs. The plaintiff's claim against the defendant is struck out.

Appeal allowed with costs.

Reported by Ezatul Zuria Azhari